126477

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

Supreme Court
No. 126477

ANTHONY WESTCARR,

Defendant-Appellant.

Court of Appeals No. 243042
3rd Circuit Court No. 01-010393

SUPPLEMENTAL BRIEF OPPOSING APPLICATION FOR LEAVE TO APPEAL

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Counterstatement of Questions Presented

I. **The grant or denial of a continuance is within the sound discretion of the trial judge. To show error the defendant must show that he was prejudiced in his defense or that a failure of justice resulted. The newly added prosecution witness provided exculpatory evidence. Can Defendant show that he was prejudiced in his defense or that a failure of justice resulted?**

The People answer: No
The Defendant answers: Yes
The trial court was not asked.
The Court of Appeals answered: No

Counterstatement of Facts

The People accept the defendant's statement of facts with the following additions. When asked during cross-examination whether defendant was laying on her when he penetrated her vaginally, the victim testified that he was not laying on her but "over her." 4/29, 69. She was also asked on cross what kept her shorts to the side during the vaginal penetration if she did not hold them to the side and she testified that after her shorts were pulled to the side that it was defendant's "private" that kept the shorts aside. 4/29, 82-83.

ARGUMENT

I.

The grant or denial of a continuance is within the sound discretion of the trial judge. To show error the defendant must show that he was prejudiced in his defense or that a failure of justice resulted. The newly added prosecution witness provided exculpatory evidence. Defendant has not shown that he was prejudiced in his defense or that a failure of justice resulted.

Standard of Review

A trial court's decision to allow a continuance is reviewed for an abuse of discretion. *People v Dowell*, 199 Mich App 544 (1993), *People v Canter*, 197 Mich App 550 (1993).

Discussion

Defendant contends that the trial court erred by allowing the prosecutor to add a doctor to the witness list and then failing to grant an adjournment so that he could get a witness to counter the prosecutor's additional doctor. The grant or denial of a continuance is within the sound discretion of the trial judge. To show error the defendant must show that he was prejudiced in his defense or that a failure of justice resulted. MCL 768.2; *People v Williams*, 386 Mich 565 (1972).

The first doctor who examined the victim after the abuse testified that he noted an intact hymen and did no further probing in the six-year-old victim's vaginal area. Five days later a doctor who examined the girl noted that the hymen was missing. The second doctor's report had not been in the requested medical records and while reviewing the records with the victim's mother before trial, the mother's memory of the medical findings was not reflected in the records received by the prosecutor. On the first day of trial, the mother brought in her copy of the medical records and there

was a page from the follow-up examination in which the doctor found the hymen to be missing. She had a page in her records that neither the prosecutor nor the defense counsel had in their records. 4/25, 143. The prosecutor moved immediately to add the doctor who had performed the examination. Defense counsel agreed that the prosecutor was moving for the amendment at the earliest possible time. 4/25, 149-150.

Defense counsel moved for an adjournment. The court rules do allow for an adjournment if certain requirements are met:

> An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.
> MCR 2.503(C)(2).

Even with good cause and due diligence, however, the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion. *People v Coy*, 258 Mich App 1 (2003). Thus, defendant needs to show three things to prevail here:

1. That an expert's testimony would have been material,
2. That he made a diligent effort to bring in the expert,
3. That he was prejudiced by the lack of an adjournment.

Defendant has not met his burden to show any of these things and the lack of prejudice is the most glaring problem because the additional doctor supported his defense.

I. Prejudice

Defendant complains now that he should have been granted an adjournment to get his own

expert to counter this new doctor. Defendant suffered no prejudice, however, by this new evidence. The newly discovered doctor's testimony, in fact, supported defendant's theory that the victim's mother was manufacturing these allegations. If the first doctor who saw the victim after the abuse testified that he thought her hymen was intact, and the second doctor testified that when he saw her four or five days later that the hymen was missing, then defendant, who had not had contact with the child after the first doctor examined her, could not be responsible. Both doctors testified at trial. And the testimony was clear both from the victim's mother and from the defendant that once the victim, her mother, and siblings left the defendant's house they did not go back until the defendant was in custody, and then, only to retrieve personal belongings. There was, in fact, much testimony about whether the computer the mother took was hers or defendant's. 4/29, 120-121, 129-130. From this evidence defendant could argue that if the hymen was present after the alleged abuse had ended but was missing five days later, either someone else was abusing the girl or her mother had destroyed the hymen in order to build this case against the defendant. Since the evidence actually helped defendant, he can show no prejudice.

In addition, defense counsel had three days to prepare his cross-examination of the new witness. This was not a case where a new witness was announced and then called on the same day. Defendant found out about the new witness on Thursday and counsel did not have to do cross-examination until the following Monday. Counsel did do an able cross-examination of the witness. 4/29, 163-176, 177-178. In addition, counsel had already had to prepare to cross-examine a medical doctor on the issue of the physical findings in this rape case. The first doctor to see the child reported injuries to the child's vaginal area and a vaginal discharge. The Doctor found excoriation of the skin on the external genitalia. The doctor explained that excoriation meant scratches, bruises

or abrasions. 4/30, 11. Defendant knew about these findings going into the trial and was obviously prepared to question this doctor. Preparation to cross-examine the second doctor would not have taken much more research.

Counsel does not even now claim that he had an expert he wanted to call but the expert was not available during the trial. Nor does he claim that he wanted the child re-examined but that a doctor could not see her during the three-day break in the trial. Defendant wants you to speculate that he has somehow been prejudiced but he has not carried his burden to show such prejudice.

At a retrial, a doctor would be stuck re-examining the child two years after the fact, and thus, very little would be gained by giving this defendant a new trial. Defendant was never told he could not bring in a doctor, he just chose not to even try, and instead he waited to bring this as an appellate issue. If any relief was possible for defendant it was possible at the time of the trial, giving him a new trial now will, in all probability, not change the evidence received by the jury.

II. Materiality

It seems unlikely that another doctor would have found that the child's hymen had miraculously reappeared, so another examination would probably not have been needed. A defense doctor would only have needed to review the previous medical records to give an opinion. The most likely reason for the difference in the findings was that the discharge and redness of the area obscured the vaginal opening and since the first doctor testified that he did not probe further once he thought the hymen was intact, it was certainly possible that the initial doctor was wrong about the presence of the hymen. This was the prosecutor's theory and defendant would not be helped by such an elucidation; he was probably better off letting the evidence remain ambiguous. The ambiguity

about the hymen could only have been helpful to defendant by allowing him to argue that he could not have been responsible for the missing hymen, having had no contact with the child between the first and second medical visits. Thus, the trial court did not err in granting the prosecutor's motion or denying defendant's request for an adjournment. A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin*, 463 Mich 43 (2000).

III. Diligence

Furthermore, defendant did have time to acquire another doctor if he had desired. The court made its ruling on Thursday and defendant did not present witnesses until the following Tuesday. Closing arguments were not heard until Wednesday. Defendant admitted that he had anticipated calling a medical expert and, in fact, his witness list had listed an unnamed medical professional when it was delivered to the trial judge only days before trial. 4/25, 151. The judge did not close the door to defendant's bringing in a doctor, the judge just did not see that an adjournment was necessary at that time since they were only at jury selection on Thursday and the trial would not be continued until Monday; defendant still had time. Certainly the victim could have been seen by another doctor in the time between jury selection and closing arguments (almost a week) or a doctor could have been consulted on the possible reasons for the differences in the two doctor's opinions.

The trial court had a discussion with defense counsel on this very matter:

> **The Court**: Well let me say this. I noticed you filed a defendant's witness list and it's dated April 22. (Jury selection was taking place on April 25).
> **Mr. Dubose** [defense attorney]: Right.
> **The Court**: And item number four, you list medical expert to be named.
> **Mr. Dubose**: Right, and the reason I did that, your Honor.
> **The Court**: So I'm presuming that you at least wanted to be able to call someone. Did you have anybody at that point.

Mr. Dubose: I had someone. I had totally abandoned that position after I had discussions with Mr. Less (the prosecutor).
The Court: After the 22 nd of this month you abandoned that position? [This exchange took place on the 25th of the same month.]
Mr. Dubose: Yes because I had discussions with Mr. Less who indicated that the doctor who made the original report that said that the hymen was intact, I think the words you used were inconclusive in terms of whether there was sexual abuse. Was that the word I recall correctly of our conversation.
Mr. Less [the prosecutor]: I believe it was something to that effect. It would be like basically what the report says, suspected child abuse. It may be there, it may not be.

But his report, his recollection after reviewing the report was that he put hymen intact. He did talk about that expurgation and diluted skin, again, we did not know about the follow-up report until we walked in after lunch.
Mr. Dubose: So once I'm under the impression that it's inconclusive from this particular doctor who is saying that the hymen is intact, there's no need for me to have an expert.
The Court: When did you make this determination that there was no need for you to have one?
Mr. Dubose: After I talked to Mr. Less, what day was that?
Mr. Less: It was either last week –
Mr. Dubose: It was one day last week, your Honor.
The Court: All right.
Mr. Dubose: I have been trying, I've made efforts to determine whether I needed this medical expert from calls to Mr. Less for probably a month.
Mr. Less: That's true.
Mr. Dubose: I've been making several efforts and my client has been on me in regards to a medical expert and I was very concerned about that particular issue.

And then I've been over a month now making efforts to contact him to clear up that issue whether I needed that or not. And he was in trial, and I was able to finally get to him to resolve that issue last week and that's part of the reason why I was as late as I was with my witness list.
The Court: Then why didn't you elicit your own expert?
Mr. Dubose: As of a month ago, I was under the impression that I needed –
The Court: I'm saying as of this Monday, April 22, the date that's on the witness list.
Mr. Dubose: I put that down to protect myself, probably, you know, because I hadn't talked to Mr. Less.

And once I confirmed with Mr. Less that this doctor was saying that, yes, it was a situation where the hymen was intact, and that it was inconclusive as to evidence of the sexual abuse, I made that determination that my expert wasn't necessary.
The Court: As of the 22 of April, did you have an expert?
Mr. Dubose: As of the 22 of April **I had an expert in mind**. That list done, your

honor, I prepared it in terms of it being typed, in terms of its form almost a month ago is all I'm trying to say, I didn't file it until later on.

* * *

The Court: I'm going to allow the endorsement to be made. The request for the adjournment is denied, and we will go forward.

It's other evidence out there, I can't ignore it. And you had been planning for an expert, or you wouldn't have designated one.

So you know, if you have been planning for one, you may have some time, I don't know, what you can do between now and when you have to put on your proofs. But if you think you need one, you need to get one.

4/25 151-155.

Defendant never again during the trial informed the court of any difficulty he was having getting his expert. Defendant did renew his objection after the first full day of trial, but he did not state any efforts he had made to get an expert or have another examination done. [1] Defendant's comment implied that he had made no effort to get another doctor or expert. If the defendant had even the slightest actual interest in getting another doctor he could at that point have informed the trial court of his efforts and asked for more time. If the expert was having trouble appearing in court before closing arguments the following Wednesday, counsel could have asked for an adjournment with a specific date in mind, but defendant never made this offer of proof. A defendant may not harbor error as an appellate parachute. *People v Hall (On Remand)* 256 Mich App 674, 679 (2003).

This case would be in a different position in this Court had counsel come into court on Monday or Tuesday and told the trial court that his expert would not be able to evaluate the case for ten days, or that he could not get the victim in to see defendant's doctor until the middle of the

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[1] Counsel stated: "Your Honor, after questioning Doctor Babitch I just want to further, for the record, renew how I feel, my opinion in terms of not being able to have an expert to challenge this particular claim, but that objection has already been made." 4/29, 190.

week. No such claims were ever made. The trial court did preclude defendant from getting his own doctor. The trial court told the trial attorney that he should do what he could during the extended time between jury selection and the first day of trial. Since the trial would not be held on Friday, Saturday or Sunday, defendant had three days to determine what could be done. If defendant had an expert in mind before trial, as he admitted, then he was not starting from scratch on this problem. The trial court did not abuse its discretion in attempting to proceed with trial while counsel determined how best to counter the prosecution's new witness.

In addition, any error was harmless. The victim's testimony against defendant never wavered and was supported by portions of the medical evidence. Though the victim could not remember details like dates, she described the acts in ways that it would be unlikely a coached child could do. When asked whether defendant was laying on her when he penetrated her vaginally, she testified that he was not laying on her but "over her." 4/29, 69. She was also asked what kept her shorts to the side during the vaginal penetration if she did not hold them to the side and she testified that after her shorts were pulled to the side that it was defendant's "private" that kept the shorts aside. 4/29, 82-83. These details are too intimate for a child of six to know and too small for a child who has not experienced sexual intercourse to understand or remember if she was just being coached.

In summary, defendant must show that the missing witness was material, that he was diligent in his efforts to secure the witness, and that the lack of an adjournment prejudiced him. Defendant cannot show that he was prejudiced by the trial court's decision because the second doctor's testimony was exculpatory and supported his defense, he had three days to prepare for cross-examination of the new witness, and the evidence at a retrial would not change. Defendant has not shown that the missing witness's testimony would be material because a new doctor might have

cleared up the ambiguity in a way that would hurt defendant's defense. And defendant did not diligently attempt to bring in another expert in the time he was given. Last, the testimony of the child contained details that proved that she had been sexually abused and no third doctor's testimony can change that fact. Defendant has failed to show that he deserves a new trial and this Court should deny his application.

Relief

ACCORDINGLY, the People respectfully request this Honorable Court to deny defendant's application.

Respectfully submitted,

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